

No. 11,628

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD MILLER,

Appellant,

VS.

BANK OF AMERICA, N. T. & S. A.,
UNITED STATES OF AMERICA and
GEORGE C. WELDEN, an individual
doing business as Wholesalers Ad-
justment Bureau of San Francisco,

Appellees.

APPELLANT'S CLOSING BRIEF.

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ARGUMENT.

I.

THE TERM "JUDGMENT CREDITOR" AS USED IN SECTION 3672 OF THE INTERNAL REVENUE CODE, AS AMENDED, IS NOT UNCERTAIN OR AMBIGUOUS AND DOES NOT REQUIRE JUDICIAL CONSTRUCTION.

In Appellant's Opening Brief, the case of *Chalmers and Williams v. Surprise*, 70 Ind. App. 646, 123 N. E. 841, was cited and a quotation taken from it in which the terms "Judgment Creditor" and "Execution Creditor" were clearly defined. In addition to the *Chalmers* case, the following definitions may be quoted:

Bouvier's Law Dictionary (1934 Ed.), page 254.

“Creditor, Judgment—One who has obtained a judgment against his debtor, under which he can enforce execution.”

Black's Law Dictionary (3rd Ed.), page 1028:

“Judgment Creditor. One who is entitled to enforce a judgment by execution (q. v.). The owner of an unsatisfied judgment.”

It will be seen that the term “Judgment Creditor” has a well defined meaning and that in no case does its definition include the levy of execution within its meaning. As shown by the *Chalmers* case (*supra*), “Execution Creditor”, is something distinct from a “Judgment Creditor”. No case has been cited by respondent United States to the contrary. The legislation contained in Section 3672(a) of the Internal Revenue Code is intended to be remedial and should be broadly construed in favor of the classes of interests there protected.

U. S. v. Maniaci, 36 Fed. Supp. 293 (affirmed 116 Fed. (2d) 935);

U. S. v. City of Detroit, 141 Fed. (2d) 1021.

In the case of *Wood v. Deck*, 112 Fed. (2d) 740, which was a case arising under the Bankruptcy Act (U. S. C. A., Sec. 103(a)(5)) it was held that one whose claim was reduced to judgment within the provisions of that section was a “Judgment Creditor”. The section provides:

“(a) Debts of the bankrupt may be proved and allowed against his estate which are * * * (5)

Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge. * * *"

There was no requirement in the *Wood* case for a levy of execution nor does the statute require one, yet this Court characterized the claimant as a "Judgment Creditor".

II.

APPELLANT IS A "JUDGMENT CREDITOR" WITHIN THE MEANING OF SECTION 3672 OF THE INTERNAL REVENUE CODE AS AMENDED.

Appellant Edward Miller had a valid and subsisting judgment against the taxpayer which was duly entered March 11, 1944, sometime prior to the receiving of the assessment list and the filing of the notices of lien by the United States Collector of Internal Revenue. Under said judgment, appellant was entitled to enforce execution and said judgment remains unsatisfied, bringing it clearly within the definitions heretofore set out under "I" hereof. Moreover, Appellant was more than a Judgment Creditor. While the statute involved does not require the Judgment Creditor to have a lien upon the property, Appellant did, in fact, have a prior attachment on the property and such lien of attachment continued after judgment, so that execution under the judgment could be had within a reasonable time, i.e., the life of the judgment.

The question of a far distant Judgment Creditor is not involved herein.

III.

THE CASES CITED BY RESPONDENT UNITED STATES ARE NOT IN POINT IN THE PRESENT CASE.

No California case has been cited which states that the term "Judgment Creditor" means "Judgment Creditor with execution issued". All of the California cases cited deal with priorities between liens under California statutes. None of these statutes purport to give priority to a "Judgment Creditor" over subsequent lien holders. The section of the Internal Revenue Code involved herein specifies judgment creditors among the classes protected therein. As said in the case of *MacKenzie v. United States*, 109 Fed. (2d) 540 (C. C. A. 9th), at page 541 :

"The federal tax lien is entirely statutory, therefore its scope and effect are to be determined solely by the statute and the decisions interpreting it. * * *"

And, in the case of *United States v. Rosenfield*, 26 Fed. Supp. 433 (E. D. Mich.), the Court said at page 436 :

"7. The aforesaid Acts of Congress, providing the manner and form by which the plaintiff, United States of America, acquired its aforesaid tax liens upon all the property and rights to property belonging to the defendant Carl Rosenfield in general, * * * for the defendant Rosenfield's said delinquent income taxes are the su-

preme law of the land applicable to the enforcement of the Internal Revenues of the United States. Said Federal statutes are controlling here and override any provisions * * * enacted by the State of Michigan * * * which are in conflict with said Acts of Congress, and under which the defendant Morrison & Townsend asserts its conflicting right, title or interest in said shares of stock.”

The only case directly in point is that of *Manufacturers Trust Co. v. Sobel*, 175 Misc. 1067, 26 N. Y. S. (2d) 145, and in that case it was definitely decided that in order to come within the meaning of “Judgment Creditor” as used in the statute herein involved, a levy of execution was not necessary. The argument of respondent United States, on page 20 of their brief, that the case of *United States v. Spreckels*, 50 Fed. Supp. 789 (N. D. Cal.), requires that there must be a record of a lien on personal property in the county where the property is situated, obviously is not a correct statement of the law. As pointed out by respondent, the California law provides:

II Deering's General Law of California (1937)
3850-3851; Act 8487. *Notices of Liens for Internal Revenue Taxes.*

“Sec. 1. *Notices, etc., may be filed.* Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the county recorder of the county or counties within which the property subject to such lien is situated.”

By express provision of Section 3672(a)(1) of the Internal Revenue Code as amended, this provision of the California Law is binding upon the United States Government in regard to the recordation of their liens. No similar provision is made by the Federal Statute in regard to Judgment Creditors, nor has any case interpreted the California statute to apply to Judgment Creditors. By its terms, the California statute for recordation of tax liens applies solely to the recordation of tax liens by the United States.

It is argued by respondent, United States, that Congress could not have meant what it said when it gave Judgment Creditors priority over subsequently filed tax liens. However, the statute is clear and unambiguous.

CONCLUSION.

Appellant herein is a Judgment Creditor within the meaning of Section 3672 of the Internal Revenue Code as amended, and being prior in time to the tax lien of the United States, is entitled to a reversal of the judgment of the trial Court and to an entry of judgment in its favor.

Dated, Berkeley, California,
October 30, 1947.

Respectfully submitted,

BERNAL & BERNAL,

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